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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILLIE HAMMOND,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE FEDERAL EMPLOYERS' LIABILITY ACT 45 U.S.C., §§ 51-60, ALLOWS RECOVERY FOR PSYCHIATRIC INJURY ABSENT A PHYSICAL TOUCHING OR "ZONE OF DANGER".

2. WHETHER A CLAIM FOR "WHOLLY MENTAL" IN JURY UNDER THE FEDERAL COMMON LAW IS PREEMPTED BY THE "MINOR DISPUTES" PRO CEDURES OF THE RAILWAY LABOR ACT, 45 U.S.C. § 153.

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On Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on June 6, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A) is reported at 848 F.2d 95. The Order of the United States District Court for the Southern District of Illinois appears in Appendix B, attached hereto.

JURISDICTION

The Judgment of the Court of Appeals (Appendix B) was entered on June 6, 1988. The Jurisdiction of this Court is evoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of the Federal Employers' Liability Act, (hereinafter referred to as FELA), 45 U.S.C. Sec. 51-60 and the Railway Labor Act, (hereinafter referred to as RLA), 45 U.S.C. Sec. 153, are set forth in the appendices F-G.

STATEMENT OF THE CASE

Petitioner, Billie Hammond, was employed by Respondent, Terminal Railroad Association of St. Louis, as a switchman. While in the course of his employment, the supervisors of the Respondent railroad engaged in a pattern of harassment toward and surveillance of the Petitioner. This activity included, but was not limited to, assignment of grossly unrealistic time estimates for Petitioner's work resulting in Petitioner's physical and mental exhaustion, extraordinary supervision of Petitioner's work including following him from work assignment to work assignment and repeated and severe criticism of Petitioner for allegedly spotting railroad cars in the wrong location on industry tracks. With regard to the latter activity Petitioner had previously received notice that he was under charges to attend a formal disciplinary hearing to investigate his alleged improper spotting of cars on industry tracks. Respondent's supervisors then induced Petitioner to sign a waiver of his right to a formal disciplinary hearing and to accept a reprimand as discipline. The inducement entailed a promise by the Respondent that if Petitioner agreed to such a waiver and acceptance of a reprimand all prosecution of disciplinary charges against him would be ended and the entire matter would be resolved. Further, Respondent threatened the Petitioner that if such inducement were not accepted, he would also be subject to loss of rights to work as a switching foreman in addition to whatever other discipline were assessed. Accepting the carrier's inducement and agreeing to a waiver of his right to a formal discipline hearing, Petitoner forever lost his right to appeal the propriety of this discipline under Sec. 3 of the Railway Labor Act, 45 U.S.C., Sec. 153.

Despite the fact that Petitioner had been induced to sign a waiver of his rights based upon Respondent's promise that all discipline prosecution would be resolved and ended, Respondent issued an additional series of written charges against the Petitioner on the following day.

Respondent arbitrarily denied the Petitioner the right to "mark off" from work on Sunday, August 26, 1985. Because of Respondent's refusal Petitioner was required to work the irregular switchman hours assigned to the "extra board", that is, seven days a week, without prospect of time off from work in which he might obtain relief from the supervisory harassment and surveillance. Respondent began a formal disciplinary hearing against the Petitioner after his admission to the hospital for psychiatric treatment and care. His formal disciplinary hearing was never concluded, nor was it ever resolved that discipline should be assessed against the Petitioner. Therefore, the Petitioner has neither been disciplined nor discharged as to the additional charges.

While hospitalized, the Petitioner was diagnosed as having a permanent, severe mental disorder; Petitioner has not been able to return to work due to this injury.

Petitioner filed his action on December 27, 1985, in the Circuit Court of the State of Illinois, Third Judicial District, County of Madison, under the Federal Employers' Liability Act, 45 U.S.C. Secs 51-60, to recover damages for disabling psychiatric injury. On January 30, 1986, the Respondent removed this action to the United States District Court for the Southern District of Illinois, Alton Division, and at the same time filed a Motion to Dismiss, claiming preemption of Petitioner's action under the Railway Labor Act, 45 U.S.C., Sec. 153. Respondent's Motion to Dismiss was heard by the District Court on November 7, 1986. At that time Petitioner filed a Motion to Remand this Action to State Court with a supporting memorandum. Petitioner was granted leave by the District Court on November 14, 1986,

to file an Amended Complaint, and an Amended Motion to Remand consistent with the Amended Complaint. In the Amended Complaint the factual issues of negligence were expanded and an additional count alleging an action pursuant to Illinois common law was inserted. A Supplementary Memorandum was filed in support of Petitioner's Amended Motion to Remand and a Second Supplementary Memorandum in Support was filed on December 4, 1986.

Respondent filed a Motion to Dismiss First Amended Complaint and a Memorandum in Support of its Motion to Dismiss on December 5, 1986. On December 8, 1986 it filed a Notice of Setting of this matter. The District Court denied the Petitioner's Motion to Remand and granted the Respondent's Motion to Dismiss on December 12, 1986. An appeal from this Order was taken on January 6, 1987.

Petitioner filed his Brief before the United States Court of Appeals for the Seventh Circuit on February 18, 1987. The Respondent filed its Brief on March 16, 1987. Petitioner filed a Reply Brief on March 30, 1987.

The United States Court of Appeals for the Seventh Circuit, on its own Motion, ordered the parties to file Supplemental Briefs discussing the effect on the instant case of their recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987). (Order attached hereto as Appendix D). Supplemental Briefs were filed by both parties pursuant to the Order.

A Circuit Rule 34(f) Notice was sent to the parties, dated August 3, 1987 (Appendix E), suggesting that oral argument might not be helpful in deciding the case. Petitioner filed a Statement as to Need for Oral Argument on August 15, 1987.

Judgment without oral argument was entered by the United States Court of Appeals for the Seventh Circuit on June 6, 1988 (Appendix B), affirming the Order of the United States District

Court for the Southern District of Illinois, Alton Division. The decision of the United States Court of Appeals for the Seventh Circuit in this case was dated June 6, 1988, the same date as this court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, ____ U.S. ____, 108 S.Ct. 1877, (1988). Despite the Seventh Circuit's Order to Comment on the effect of their Decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, on the instant case, neither their decision in *Lingle* nor this Court's reversal of their decision, is mentioned in the Seventh Circuit's decision in the case at bar. (Appendix A).

FACTS FILED WITH DISTRICT COURT IN MEMORANDA

REASONS FOR GRANTING THE WRIT

I. Federal Employers' Liability Act allows recovery for psychiatric injuries in the absence of a physical touching or a "zone of danger".

The Petitioner seeks recovery under the Federal Employers' Liability Act for emotional injuries resulting from the continued harassment by the Respondent, Terminal Railroad Association of St. Louis. This Court in *Atchison, Topeka and Santa Fe Railway Company v. Buell*, 476 U.S. 1103, 107 S.Ct. 1410, (1987) stated that there was no reason to believe that allowing recovery for emotional harm would wreak havoc upon the RLA arbitration system. *Buell*, 476 U.S. 1103, 107 S.Ct. 1410, 1416. Stopping short of deciding if purely emotional injuries were cognizable under the FELA, this Honorable Court declared that the FELA, not the RLA, would control the determination. *Buell*, 476 U.S. 1103, 107 S.Ct. at 1417. In view of the broad scope of the FELA, Petitioner submits that wholly emotional injuries are cognizable under the Act.

The circuits appear to be divided as to the proper rule of law applicable to emotional injuries under the FELA. In the instant case, *Hammond v. Terminal Railroad Association*, 848 F.2d 94 (7th Cir. 1988) the Seventh Circuit cited one of its earlier decisions, *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985) and held that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." *Hammond,* 848 F.2d at 97. (Appendix A). The Sixth Circuit is in accord with these decisions. *Adkins v. Seaboard Systems Railroad*, 821 F.2d 340 (6th Cir. 1987). The First Circuit appears to be undecided as a result of this court's holding in *Buell*. See *Moody v. Maine Central Railroad*, 823 F.2d 693 (1st Cir. 1987) and *Robert v. Consolidated Rail Corp.*, 832 F.2d 3 (1st Cir. 1987). Likewise the Fifth Circuit has shown some indeci-

sion by requiring in some instances a slight physical manifestation of the emotional injury and in others stating that wholly emotional injuries are recoverable without physical injury. See *Yawn v. Southern Railway Company*, 591 F.2d 312 (5th Cir. 1979) and *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir. 1986) modified, 797 F.2d 256 (5th Cir. 1986) respectively.

The Ninth Circuit on the other hand clearly allows recovery for purely emotional injuries. *Buell v. Atchison, Topeka and Santa Fe Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985). In *Buell* the plaintiff alleged that he suffered an emotional breakdown from harassment by supervisors and fellow employees. The plaintiff also alleged that the railroad was negligent in failing to stop the harassment. The Ninth Circuit in examining the scope of the FELA refused to apply an impact rule. It stated in pertinent part:

> . . . the concept of injury under the FELA is extremely broad; the Act encompasses all reasonably foreseeable injuries which result from a railroad's failure to exercise due care with respect to its employees,

Buell v. Atchison, Topeka and Santa Fe Ry. Co., 771 F.2d 1320, 1322 (9th Cir. 1985). California law, the forum state of *Buell*, is in accord. *McMillan v. Western Pacific Railroad Co.*, 54 Cal. 2d 841, 9 Cal. Rpt. 361, 357 P. 2d 449 (1960). Moreover, post-*Buell* cases have reaffirmed the wholly emotional rule. (See, *Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309 (9th Cir. 1986), where the court noted it was bound by *Buell*, and *Toscano v. Burlington Northern R. Co.*, 678 F.Supp. 1477 (D.Mont. 1987).

In *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D. N.Y. 1987) the plaintiff alleged that the defendant was negligent in failing to properly hire, train and supervise its management and that this negligence caused the harassment of the plaintiff's decedent contributing to his suicide. There the court noted:

> It is true that in the past, courts were reluctant to allow compensation for psychic injury unaccompanied by physical injury. However, most courts now recognize such claims although they exercise caution in this area.

Id. at 139.

In addition to the cases cited above, it also appears that the forum state's (Illinois) common law would provide a remedy for the petitioner in this case. *Milton v. Illinois Bell Telephone*, 101 Ill. App. 3d 75, 427 N.E. 2d 829, 56 Ill. Dec. 497 (1st Dist. 1981). The court in *Milton* allowed recovery for intentional infliction of emotional distress by an employer even in the absence of physical touching or a "zone of danger."

This Court has instructed that the federal courts should look to forum state law which is developing and refining the tort of intentional infliction of emotional harm. *Buell*, 476 U.S. 1103, 107 S.Ct. at 1417-1418. Since forum state law would allow recovery under the doctrine of *Milton*, the U.S. District Court for the Southern District and the Seventh Circuit Court of Appeals should have done no less in applying the Federal Employers' Liability Act in this case.

Further, it would appear that at least one district court in the Seventh Circuit has applied forum state law without offending the holding of *Lancaster*. *Gillman v. Burlington Northern Railroad Company*, 673 F.Supp. 913 (N.D. Ill. 1987). That court cited the Illinois case of *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N.E. 2d 1, 5, 75 Ill. Dec. 211, 215 (1983), as authority holding that an FELA plaintiff will be allowed to recover when in the "zone of danger".

The petitioner further submits that the Seventh Circuit requirement of a physical contact or fear of imminent contact in *Lancaster* is unduly narrow in view of the broad scope of the FELA. In *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949), the Supreme Court rejected the contention that

"injury" under the FELA requires the employee to suffer an injury by external violent and accidental means:

> In our view, when the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning. Silicosis is as much "injury", leading in time as certainly to permanent disability, as scalding from an explosion. We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding the one type of injury from the Act's coverage or that such an exclusion would be consistent with its language, purposes, or unvarying standards of construction.

Urie, 337 U.S. 163, 181-182, 69 S.Ct. 1018, 1033. (see also *Randall v. Reading Co.*, 344 F.Supp. 879 (1979) where the conduct of employer which gives rise to the injury need not involve physical contact.)

In the case at bar the Petitioner has suffered a severe and permanent emotional disorder, mental distress, and nervous tension, requiring hospitalization. He has never been discharged from employment. The Seventh Circuit's holding in *Lancaster* has relegated petitioner to an RLA remedy which is totally inadequate and in direct conflict with the FELA's purposes:

> restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted would be contradictory to the wording, the remedial and humanitarian purpose and the constant and established course of liberal construction of the Act followed by this Court.

Urie, 337 U.S. 163, 181-182, 69 S.Ct. 1018 at 1030-31.

While Petitioner argues that the Ninth Circuit's wholly emotional rule should apply, he submits that he has nevertheless met the minimal physical manifestation requirement set forth in *Yawn v. Southern Ry. Co.*, 591 F.2d 312, (5th Cir. 1979). In *Yawn* a group of employees argued that the railroad negligently failed to provide them with adequate help and time to do their work causing them severe emotional distress and gastrointestinal disturbances. The court held that the plaintiffs could recover for the emotional distress because there were physical manifestations present, i.e., the stomach disorders. Also, in *Halko*, 677 F.Supp. 135 mentioned above, the court noted that the suicide of the individual constituted a physical manifestation. In the present case petitioner Hammond has exhibited significant physical manifestations of injury including sleeplessness, severe chest pain, epigastric pain, and faintness. He has suffered a severe and permanent emotional disorder for which he has been treated in psychiatric wards. His prognosis indicates he will need similar treatment in the future. Certainly commission of suicide should not be a prerequisite to Petitioner's recovery. The fact that he has suffered as described above and the fact that he is totally disabled should be sufficient to state a cause of action under the FELA.

Given the importance of the FELA as a remedy and the inadequacies of the RLA in general and in this case in particular, this Court should grant the Writ in order to consider the important, recurring question of whether wholly emotional injuries are cognizable under the FELA.

In this case, the Court of Appeals has placed the Petitioner in the position of seeking inadequate or non-existent remedies from an Adjustment Board, thereby depriving him of the right to a jury determination as to his permanent and severe psychiatric injury. *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 521, 77 S.Ct. 443, 459 (1957). This court

should grant certiorari to correct instances of improper administration of the Federal Employers' Liability Act, to resolve a conflict among the federal circuits on this issue and to prevent the erosion of the F.E.L.A.

II. A claim for "wholly mental" injury under the Federal Employers' Liability Act or in the alternative Illinois common law, is not preempted by the "minor disputes" procedures of the Railway Labor Act.

The United States Court of Appeals for the Seventh Circuit determined in the instant case that the Petitioner's claim involves a dispute over the terms of his collective bargaining agreement:

> "Although the statute dates from a time when no one could have imagined that FELA would be involved in a case as this, *which involves a dispute over the terms of the collective bargaining agreement between the plaintiff's union and the railroad and is thus on a collision course with the Railway Labor Act's commitments to arbitrable resolution of such disputes*, we see no way around the stark imperative of Sec. 1445(a) unless it is apparent from the pleadings that the suit arises under the Railway Labor Act rather than the FELA, so that the effect of the Complaint is mislabeled." (emphasis added).

Hammond v. Terminal Railroad Association of St. Louis, Slip Op. at 3 (Exhibit A), 848 F. 2d at 97.

However, nowhere in its decision did the Seventh Circuit cite a collective bargaining agreement requiring an interpretation by a Railway Labor Act Adjustment Board, nor did Respondent in any of its pleadings identify a collective bargaining agreement that in any manner addressed its harassment and surveillance of the Petitioner. As the Petitioner was never discharged from the employment of the Respondent, the "just cause" requirement of the discipline provision of the collective bargaining agreement is not actuated.

Respondent must meet the burden of showing at least an arguable case of preemption before the jurisdiction of a state court will be ousted. *International Longshoreman's Association, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 1915 (1986). In the instant case neither the Respondent nor the two courts below have indicated the provision of the collective bargaining agreement which allegedly controls Petitioner's claim.

If the Petitioner's claim is "independent" of the collective bargaining agreement, and the resolution of the claim does not require construction of the collective bargaining agreement, it is not preempted by Federal Labor Law. *Lingle v. Norge Division of Magic Chef, Inc.*, ____ U.S. ____, 108 S.Ct. at 1882-1883 (1988).

Furthermore, this Court has recognized that even though Petitioner's injury was caused by conduct that may have been subject to arbitration under the Railway Labor Act he may nevertheless opt to bring an action under the Federal Employers' Liability Act for damages. *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 476 U.S. 1103, 107 S.Ct. 1410, 1415 (1987).

In *Buell*, this Court went on to state that the narrow remedies through arbitration under the Railway Labor Act were inadequate to address the injuries suffered by the Petitioner:

> The FELA not only provides railroad workers with substantive protection against negligent conduct that is independent of the employer's obligations under its collective bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the *limited relief* that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a *narrow* labor grievance under the RLA to a successful conclusion. (emphasis added)

Buell, 476 U.S. 1103, 107 S.Ct. at 1415-1416.

Even the Seventh Circuit Court of Appeals has recognized the limited relief available through such an arbitrated solution:

> Arbitrators have no particular competence to determine causality and assess damages in cases of serious personal injury, whether physical or *mental*. (emphasis added).

Lancaster v. Norfolk and Western Railway Company, 773 F.2d 807, 816 (7th Cir. 1985). That court noted that the normal remedies imposed by arbitrators are reinstatement, back pay, vacation pay, etc. *Lancaster*, 773 F.2d at 817. None of these arbitral remedies would be adequate to redress Petitioner's permanent and severe mental disorder. Petitioner is seeking damages for extended medical treatment, hospitalization, permanent disability, future lost wages and for pain and suffering. None of these items are within the arbitrator's authority to assess. *Sharkey v. Penn Central Transportation Company*, 493 F.2d 685, 688 (2nd Cir. 1984).

The First Division, National Railroad Adjustment Board, has consistently held that it lacks the power to assess damages where it is not expressly granted such a power within the labor contract it construes. Award Nos. 6641, 6679, 6758, 7057, 12245, 12855, 18948, N.R.A.B. (1st Div.). There is no contractual provision authorizing damages for medical treatment, hospitalization, permanent disability, future lost wages and for suffering and pain.

At no point in its decision in the instant case did the Court of Appeals discuss its findings as they relate to the Petitioner's Illinois common law claim found within Count II of the Amended Complaint. Illinois allows recovery by employees for intentional infliction of emotional distress by their employers. *Milton v. Illinois Bell Telephone Company*, 101 Ill. App. 3d 75, 427 N.E. 2d 829, 833, 56 Ill. Dec. 497, 501 (1st Dist. 1981). This is even true in the absence of a physical touching or a "zone of

danger". *Id.* Since the state law claim of intentional infliction of emotional distress does not interfere with the Railway Labor Act process, Petitioner's claim should be allowed to proceed in the alternative under Illinois Common law despite the fact that the Court of Appeals found that his claim was not within the purview of the Federal Employers' Liability Act. Moreover, other jurisdictions have recognized a common law cause of action for intentional infliction of emotional distress that is neither preempted by the Federal Employers' Liability Act nor the Railway Labor Act. *Pikop v. Burlington Northern Railroad, 390 N.W. 2d 743, 753, 755 (Minn. 1986). See also, Balzeit v. Southern Pacific Transportation Company*, 569 F.Supp. 986, 988-989 (N.D. CA. 1983).

Although this Illinois Common Law count was added through the Amended Complaint, the Petitioner had an absolute right to so amend his Complaint under Rule 15 of the Federal Rules of Civil Procedure, where there is no responsive pleading by the Respondent. *Breier v. Northern California Bowling Proprietors Association*, 316 F.2d 787 (9th Cir. 1963); *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369 (9th Cir. 1981); *Chodos v. F.B.I.*, 559 F.Supp. 69 (D.C.N.Y. 1982).

The weight of authority supports the conclusion that where a plaintiff's state common law claims or statutory law claims are not concerned with questions of labor contract interpretations, such claims are not preempted from state court consideration. See *eq., Raybourn v. Burlington Northern Railway Company*, 602 F.Supp. 385, 387 (W.D. Mo. 1985)(cause of action by employee for false arrest and imprisonment by defendant railroad employer's agents in the wrongful institution of his arrest and confinement by the police was not preempted by the Railway Labor Act); *Anderson v. Ford Motor Company*, 803 F.2d 953, 955-959 (8th Cir. 1986)(cause of action under state common law for fraudulent misrepresentation, contractual and quasi-contractual claims independent of the labor contract are

outside of the preemptive scope of the Labor Management Relations Act); *Surrency v. Harbison*, 489 So. 2d 1097, 1102 (Ala. 1986)(cause of action for slander, assault and battery claims not bound by questions of labor contract's interpretation are not, per se, preempted from state court consideration); *Trumbauer v. Group Health Cooperative of Puget Sound*, 635 F.Supp. 543, 548-549 (W.D. Wash. 1986)(cause of action for discrimination on the basis of a social relationship impinging on freedom of association right to privacy under the Washington State Constitution did not require interpretation of collective bargaining agreement and was therefore not preempted by Labor Management Relations Act); *Norman v. Missouri Pacific Railroad*, 414 F.2d 73, 81-82 (8th Cir. 1969)(cause of action for racial discrimination in the employment practices of a carrier was not preempted by the Railway Labor Act); *Quinn v. Southern Pacific Transportation Company*, 76 Or. App. 617, 622, 711 P. 2d 139, 144 (Or. Ct. App. 1985)(cause of action for violation of state handicap statute was not preempted by the Railway Labor Act); *Chicago and Northwestern Railroad v. Labor and Industry Review Commission*, 91 Wis. 2d 462, 470-471, 283 N.W. 2d 603, 611-612 (Wis. Ct. App. 1979)(cause of action for violation of state handicap statute was not preempted by the Railway Labor Act); *Baker v. General Motors Corporation*, 478 U.S. 621, 106 S.Ct. 3129, 3139 (1986)(cause of action under state statute providing that employee was ineligible for unemployment compensation was not preempted by the National Labor Relations Act); *Malia v. RCA Corporation*, 794 F.2d 909 (3rd Cir. 1986)(cause of action for intentional infliction of emotional distress, fraudulent misrepresentation and intentional interference with contract was not preempted by Labor Management Relations Act); *Belknap, Inc. v. Hale*, 463 U.S. 491, 493-97, 103 S.Ct. 3172, 3174-76 (1983)(actions for state law claims of misrepresentation and breach of contract was not preempted by the National Labor Relations Act); *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, et al.*, 430 U.S. 290, 97 S.Ct. 1056, 1064

(1977) (National Labor Relations Act did not preempt state court cause of action or recover damages for intentional infliction of emotional distress against union); *United Association of Journeyman and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local No. 57 v. Bechtel Power Corporation*, 834 Fed. 2d 884, 890 (10th Cir. 1988)(workers' black listing claims under Utah law were not preempted by Labor Management Relations Act); *Saquin v. Haley Brothers, Inc.*, 652 F.Supp. 581, 583-584 (C.D. Cal. 1987)(state law causes of action for wrongful termination, breach of implied covenant of good faith and fair dealing, and intentional infliction of emotional distress by employee who was fired after writing letter complaining about allegedly abusive conduct to her supervisor, were not preempted by the National Labor Relations Act); *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133, 137-138 (7th Cir. 1987)(employee's tort claims for intentional infliction of emotional distress and invasion of privacy were not preempted by Labor Management Relations Act).

CONCLUSION

Because the decisions of the courts below are in conflict with the decisions and principles announced by this Court, and are in conflict with the decisions found among the other Circuits of the United States Court of Appeals, as well as the common law of the forum state and because valuable interests are at issue, this Court should grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 87-1040

Billie Hammond,

Plaintiff-Appellant,

v.

Terminal Railroad Association of St. Louis, a corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 86 C 5038-William L. Beatty, Judge.

Submitted April 18, 1988—Decided June 6, 1988

Before Posner, Easterbrook, and Manion, Circuit Judges.

Posner, Circuit Judge. The Plaintiff, a railroad worker, originally filed this suit in state court. The suit alleged that the railroad, by charging the plaintiff—"inappropriately and for the purpose of causing harassment and emotional stress directed toward the plaintiff"—"with a violation of his job duties" and with "unnecessary delays in his job performance," had violated the Federal Employers Liability Act, 45 U.S.C. §§ 51-60. The railroad removed the case to Federal District Court on the ground that the suit was actually a "minor dispute" arising under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq*. The plaintiff then filed in the district court an amended complaint. The complaint charged the railroad with unfairly criticizing the plaintiff's work, prosecuting unwarranted disciplinary charges against him, setting unrealistic work quotas and "wearing him out physically and mentally thereby," harassing him by "keeping an extraordinarily close watch on [his] work and following him from work assignment to work assignment," conducting

disciplinary proceedings against him unfairly (as by tricking him into signing a waiver of his right to a formal investigation), and, by these tactics, deliberately inflicting emotional distress on him. The district court denied the plaintiff's motion to remand the case to the state court and then dismissed the plaintiff's suit on the ground that in minor disputes the exclusive remedy (with immaterial exceptions, see *Brotherhood of Railway, Airline & Steamship Clerks v. Atchison, Topeka & Santa Fe Ry.*, No. 87-1313, slip op. at 11-18 (7th Cir. May 20, 1988)) is arbitral.

While the plaintiff's appeal to this court from the dismissal of his suit was pending, the Supreme Court decided *Atchison, Topeka & Santa Fe Ry. v. Buell*, 107 S.Ct. 1410, 1416-17 (1987), which holds that no part of the Federal Employers Liability Act was repealed by the Railway Labor Act. A suit that states a claim under the FELA therefore cannot be thrown out on the ground that it is really a minor dispute under the RLA. It can, of course, be thrown out on the ground that it does not state a claim under the FELA, and in *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 813 (7th Cir. 1985), we held that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." Given *Lancaster*, the present suit, even as embroidered in the amended complaint, has no merit. But the anterior question is whether the suit was properly removed; for if not, the district judge had no authority to decide the case on the merits, his only choice being to remand the case to the state court in which it had been filed originally.

Section 1445(a) of the Judicial Code provides that "a civil action in any State court against a railroad . . . arising under" the FELA "may not be removed to any district court of the United States." Although the statute dates from a time when no one could have imagined that the FELA would be invoked in a case such as this, which involves a dispute over the terms of the collective bargaining agreement between the plaintiff's union and the railroad and is thus on a collision course with the Railway

Labor Act's commitment to arbitral resolution of such disputes, we see no way around the stark imperative of section 1445(a) unless it is apparent from the pleadings that the suit arises under the Railway Labor Act rather than the FELA, so that in effect the complaint is mislabeled.

A claim does not arise under the FELA merely because the plaintiff names that statute in his complaint and omits (accidentally or by design) the claim's true source. If Billie Hammond thought he had been paid less by the railroad than he was entitled by the collective bargaining agreement to be paid, and sued the railroad in the state court merely by describing the suit as one to redress an "injury" that he had suffered while employed by the railroad and that had been caused by the "negligence" of the railroad's employees—the critical terms in the FELA. See 45 U.S.C. § 51. It would be a suit to enforce the collective bargaining agreement and would therefore arise under the Railway Labor Act and be removable to federal district court. *Andrews v. Louisiana & Nashville R.R.*, 406 U.S 320 (1972), illustrates the principle. A railroad worker brought a suit in state court for wrongful discharge under state law; but since the Railway Labor Act occupies the field of such disputes, the Court held that the case really arose under that Act and not under state law, and it could therefore be removed. Similarly, if the present suit really arises under the Railway Labor Act and not the FELA, it is removable even though the plaintiff describes it as a suit to enforce the FELA. Compare *Yawn v. Southern Ry.*, 591 F.2d 312, 316-17 (5th Cir. 1979), where the court concluded that the dispute was within the scope of the FELA and therefore (anticipating *Buell*) not a minor dispute within the meaning of the RLA, so that removal was held to be improper.

We think it evident that Mr. Hammond's claim does arise under the RLA rather than the FELA. This conclusion is independent of our holding in *Lancaster* that the FELA is limited to tortious conduct involving unwanted physical contact or

threats of such conduct. The defendant's right to remove a case from state to federal court depends on the complaint filed by the plaintiff in state court. If that complaint states a claim that is removable, such a claim under the Railway Labor Act, removal is not defeated by the fact that, after the case is removed, the plaintiff files a new complaint, deleting the federal claim or stating a claim that is not removable. *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir. 1985); *Brown v. Eastern States Corp.*, 181 F.2d 26, 28-29 (4th Cir. 1950); *Collins v. Dartmouth Plan, Inc.*, 646 F.Supp. 244 (D.Conn. 1986); *Armstrong v. Monex International, Ltd.*, 413 F.Supp. 567, 569 (N.D. Ill. 1976); see *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294-95 (1938). For how could a case be thought "improvidently" removed, 28 U.S.C. § 1447(c), if at the time of removal the only pleading in the case stated a claim that was within the federal removal jurisdiction?

When the defendant removed this case to federal district court, the plaintiff's only pleading was the complaint he had filed in state court. That pleading complained only about the railway's having filed allegedly unmeritorious disciplinary charges; it was a pure breach of contract claim, like a claim of having been fired without just cause; and the contract is the collective bargaining agreement. If the original claim arose not under the FELA but under the RLA—as it surely did—the district court could not be faulted for denying the motion to remand the case to state court.

The *amended* complaint, filed in the district court after the denial of the motion to remand, stated no claim under the FELA as interpreted in *Lancaster*, though it could not be thought frivolous, since the Ninth Circuit explicitly disagrees with *Lancaster* (see *Lewy v. Southern Pacific Transportation Co.*, 799 F.2d 1281, 1288 (9th Cir. 1986)(citing cases)), the Fifth Circuit disagrees implicitly (see *Yawn v. Southern Ry., supra*), and the Supreme Court reserved the issue in *Buell* (see 107 S.Ct. at 1417-18). We know of no case, however, where allegations of

the sort found in Hammond's *original* complaint have been thought even remotely sufficient to state a claim under the FELA. *Buell*, for example, involved allegations of intimidation, which apparently included an actual assault. See 107 S.Ct. at 1412, 1418 n. 22. Even *Yawn*, which we criticized in *Lancaster*, and which goes farther in expanding the scope of the FELA than any other case we have found, involved a claim that the railroad had so overworked its employees as to create "unsafe working conditions." 591 F.2d at 317. While Hammond's amended complaint took the hint of *Yawn* and accused the railroad of having by its conduct "failed to provided the plaintiff with a reasonably safe place to work free of intentional supervisory harassment," there is no hint of such an accusation in the original complaint.

This suggests an independent ground for denying Hammond's motion to remand his case to state court: that his FELA claim (again we emphasize that we are speaking of the case as pleaded in the state court) was frivolous. Granted, a claim cannot be said *not* to arise under the FELA (or, equivalently, the Jones Act) merely because it is found in the end not to be a meritorious claim, see *Porter v. St. Louis-San Francisco Ry.*, 354 F.2d 840 (5th Cir. 1966); *Chacon v. Atchison, Topeka & Santa Fe Ry.*, 320 F.2d 331 (10th Cir. 1963), although there is at least superficially contrary authority, see *Addison v. Gulf Coast Contracting Services, Inc.*, 744 F.2d 494, 498-99 (5th Cir. 1984); *Preston v. Grant Advertising, Inc.*, 375 F.2d 439 (5th Cir. 1967) (per curiam). But a frivolous claim does not involve federal jurisdiction, see *Hagans v. Lavine*, 415 U.S. 528, 537 (1974); *Crowley Cutlery Co. v. United States*, No. 87-2836, slip op. at ____ (7th Cir. June ____, 1988); *Cronson v. Clark*, 810 F.2d 662, 665 (7th Cir. 1987), and neither should a frivolous invocation of the FELA bar removal. This may be all that *Addison* ("remand is not required where the complaint failed to allege sufficient facts to support a cause of action under the Jones Act," 744 F.2d at 498) and *Preston* are about.

Even more clearly than in *Andrews*, where the Supreme Court had to reverse one of its previous decisions in order to establish that the suit was based on the Railway Labor Act rather than (as plaintiff had thought) on state law, Hammond's original claim was based on the collective bargaining agreement rather than on the tort principles embodied in the FELA. It therefore arises not under that statute but under the Railway Labor Act, and was removable to federal court. The amended complaint which Hammond then filed was not frivolous, but it was clearly barred by *Lancaster* and therefore properly dismissed.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT — WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 6, 1988.

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

No. 87-1040

Billie Hammond,

Plaintiff-Appellant,

v.

Terminal Railroad Association of St. Louis, a corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Alton Division.

No. 86-C-5038

William L. Beatty, Judge.

This cause came before the Court for decision on the record from the United States District Court for the Southern District of Illinois, Alton Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

Billie Hammond,

Plaintiff,

v.

Terminal Railroad Association of St. Louis, A Corporation,

Defendant.

Filed: Dec. 12, 1986

A. Marvin Helart
Clerk U.S. District Court
Southern District of Illinois
Alton Office

No. 86 5038

ORDER

This action was filed in state court, alleging that plaintiff, an employee of defendant, TRRA of St. Louis, was harassed by his employer through a series of unwarranted and inappropriate charges as a result of which plaintiff suffered depression and mental disorders. Defendant removed the action to this court, urging that the charges constitute a "minor dispute" governed by the NLRA 45 U.S.C. Sec. 153 First (i). Defendant, upon removal, filed a motion to dismiss because this is a "minor dispute" and plaintiff failed to exhaust administrative remedies.

Plaintiff then filed a motion to remand this cause and has filed an amended complaint. We believe that we must decide the motion to remand based on the complaint as it was at the time of removal and not as plaintiff has now amended it.

Though concurrent with the filing of their motion to remand plaintiff amended their complaint by deleting allega-

> tions relating to the 1934 Act, it is undisputed that such an amendment after removal does not serve to defeat federal jurisdiction if the case was 'properly removable upon the record as it stood at the time the petition for removal was filed.' (citations omitted.) *Armstrong v. Monex Intern Limited*, 413 F.Supp. 567 (N.D. Ill. 1976).

The original complaint, alleging harassment through the bringing of unwarranted charges, which caused plaintiff emotional distress, alleges jurisdiction in the state court pursuant to FELA. 45 U.S.C. Sec 51 *et seq*. Clearly, if this is a FELA action filed in the state court, it is not removable. In *Lancaster v. N & W Railroad*, 773 F.2d 807 (7th Cir. 1985), a case in which plaintiff alleged that he sufferd mental distress and illness because of harassment by a series of supervisors, the court discussed whether plaintiff's complaint under the FELA was preempted by the NLRA. The court, assuming that the complaint was a FELA claim, found that it was not preempted by the NLRA. However, the facts on which the FELA claim was based were different from the allegations before us. In *Lancaster* a series of supervisors had harassed the plaintiff, on at least two occasions putting him in actual physical fear. The *Lancaster* Court without so ruling, did assume that the assaults which caused the emotional distress stated a FELA claim. In the instant case, plaintiff alleges that the emotional distress was caused by the bringing of charges against him. There are no allegations of assault.

Again, without actually ruling on the matter, the Seventh Circuit, in *Lewis v. Louisville & Nashville Railroad Co.*, 758 F.2d 219 (7th Cir. 1985) apparently found that a charge of harassment which caused emotional distress was separate from a FELA claim and could have been removed. Thus, the court held that the removal more than 7 months later was untimely. The harassment alleged in *Lewis* was for bringing a FELA claim, not, as in the instant case allegedly the FELA claim itself.

We believe neither of the Seventh Circuit cases discussed above is really on point as to the facts and issues before us. Rather, *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978) seems most closely analagous to the matters before us. In *Magnuson*, plaintiff alleged that he was a victim of a conspiracy in which defendants used false evidence at the hearings on charges against him, thus causing emotional distress. The court stated that:

> Both the investigation requirement and the fair hearing right are products of a collective bargaining agreement. Under Article 24 of the labor contract between Burlington and the American Train Dispatchers Association, a train dispatcher cannot be disciplined 'without proper investigation.' The article also spells out the component of a proper investigation and a hearing including prior notice to the employee, the right of the employee to representation and to the presence of witnesses at the hearing, and the right of internal appeals, following decision, through the railroad hierarchy to the adjustment board. All of the alleged misfeasances of the railroad employee is thus 'arguably' governed by the collective bargaining agreement or has a 'not obviously insubstantial' relationship to the labor contract. Under these circumstances, the controversy is a minor dispute within the exclusive province of the grievance mechanisms established by the RLA. (citations omitted.) *Magnuson v. Burlington Northern, Inc.* 576 F.2d at 1369.

Although in *Magnuson*, plaintiff was also discharged after these unfair hearings, the plaintiff did allege that charges and hearings were unfairly and wrongfully brought against him, causing him emotional distress, just as does plaintiff in the instant case.

If plaintiff herein has any right to be free of charges in connection with his work performance, that right must lie in the collective bargaining agreement. Thus, whatever defendant did

in the instant case was "arguably" covered by the collective bargaining agreement or had a "not insubstantial" relationship to the labor contract. The federal law therefore preempts the area because the claim is inextricably intertwined with the bargaining machinery and removal was therefore proper.

As to defendant's motion to dismiss, based on our findings above, we would agree that this matter is a "minor dispute" growing out of the employment relationship with defendant railroad and thus subject jto the explicit jurisdiction of the dispute resolving mechanisms under the NLRA.

Accordingly, the motion of plaintiff to remand this cause of action to state court must be and the same hereby is denied. The motion of defendant to dismiss this cause must be and the same hereby is ordered granted.

IT IS SO ORDERED.

DATED: This 12th day of December, 1986.

William L. Beatty
United States District Judge

NOTE: CLERK TO FORWARD COPIES TO ALL PARTIES.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

June 30, 1987

No. 87-1040

By the Court:

Billie Hammond,
Plaintiff-Appellant,

v.

Terminal Railroad Association of St. Louis,
A Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois,
Alton Division.

No. 86-C-5038,

Hon. William L. Beatty, *Judge*.

ORDER

The court, on its own motion, orders the parties to file supplemental briefs, on or before July 14, 1987, discussing the effect on this case of our recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, No. 85-2971, slip op. (7th Cir. June 23, 1987) (en banc).

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 3, 1987

No. 87-1040

By the Court:

Billie Hammond,
Plaintiff-Appellant,

v.

Terminal Railroad Association of St. Louis,
A Corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois,
Alton Division

No. 86 C 5038

Judge William L. Beatty

CIRCUIT RULE 34(f) NOTICE

It has been suggested that oral argument may not be helpful in deciding this case. If there is no oral argument, a panel of three judges will decide this case on the basis of the briefs and record. Within fourteen (14) days of the date of this notice any party to this appeal may file a "STATEMENT AS TO NEED FOR ORAL ARGUMENT," suggesting reasons why oral argument may be necessary for proper resolution of the issue presented. An original and three (3) copies of your statement must be filed with the Clerk of this Court, together with proof

of service on opposing counsel. Such statement will be considered, but oral argument may or may not be granted. See Rule 34 of the Federal Rules of Appellate Procedure and Rule 34(f) of the Circuit Rules of the Seventh Circuit.

If the court decides that oral argument would not be helpful, the next document you will receive regarding this matter will be the final decision. That decision will be reached by a panel of three (3) judges after submission of the record and briefs already filed herein. On the other hand, if the court decides that oral argument would be helpful, the next document you will receive concerning this matter will be a "Notice of Oral Argument." Such notices are sent out approximately four (4) weeks in advance of the date scheduled for oral argument.

APPENDIX F

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any per-

son suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be

held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent to void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

APPENDIX G

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer of officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the

foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division

to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division

any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving

compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose

of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdic-

tion of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

(2)

No. 88-399

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILLIE HAMMOND
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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12 pp

QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion under Supreme Court Rule 17.1 and issue Writ of Certiorari.

Terminal Railroad Association of St. Louis is a corporation, without any subsidiaries or affiliates. The Terminal Railroad Association of St. Louis stockholders are the Burlington Northern Railroad Company, the Missouri Pacific Railroad Company, the St. Louis Southwestern Railroad Company, and the Illinois Central Railroad Company.

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No. 88-399

IN THE

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OCTOBER TERM, 1988

BILLIE HAMMOND
Petitioner,

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TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case sets out unnecessary facts without support in the record before the trial court. Respondent herein sets forth a concise statement of the case as it was presented in the lower courts.

Petitioner's original complaint was purportedly brought pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.*, alleging that the respondent had twice brought formal charges against petitioner that were "inappropriate and unwar-

ranted." (Complaint, pp.1-2). The complaint alleged that petitioner suffered "deep depression and agitation" resulting from the charges. (Complaint, p.2). Petitioner's amended complaint alleged that respondent: 1) repeatedly and severely criticized petitioner; 2) set wildly unrealistic time estimates for tasks assigned to petitioner; 3) kept extraordinary close watch on petitioner's work; 4) induced petitioner to sign a waiver of his right to formal investigation by promising to discontinue disciplinary proceedings against him if he would do so; 5) contrary to its previous promise, issued an additional series of written charges against petitioner; 6) arbitrarily denied petitioner the right to "mark off" from work, thereby requiring him to remain working irregular hours; and 7) held a discipline hearing in petitioner's absence. (First Amended Complaint, pp.2-3). The amended complaint also alleged that these same infractions constituted a state tort claim for intentional infliction of emotional distress. (First Amended Complaint, pp.4-7).

Respondent timely moved to dismiss each complaint, alleging that the acts complained of in the complaints did not state a cause of action under the FELA, but constituted "minor disputes" under the Railway Labor Act, 45 U.S.C. §151 *et seq.* (RLA), and were therefore preempted by the mandatory arbitration procedures established by the RLA. (Motion to Dismiss, pp.1-2; Motion to Dismiss First Amended Complaint, p.1). The United States District Court for the Southern District of Illinois, Beatty, J., granted respondent's motion and dismissed the action. The United States Court of Appeals for the Seventh Circuit affirmed, finding that the allegations of the complaints did not constitute a claim under the FELA, but instead arose under the RLA. *Hammond v. Terminal R.R. Ass'n,* 848 F.2d 95 (7th Cir. 1988).

ARGUMENT

Petitioner seeks review of the seventh circuit's decision on four bases: (1) that the circuit courts are in conflict as to the proper

rule of law applicable to emotional injuries after this court's decision in *Buell v. Atchison, T. & S.F. Ry.*, 476 U.S. 1103, 107 S.Ct. 1410 (1987); (2) that the appellate court erred in dismissing petitioner's state law claim for intentional infliction of emotional distress; (3) that *Hammond* and its predecessor, *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 1602 (1987), are in conflict with *Urie v. Thompson*, 337 U.S. 163 (1949); and (4) that *Hammond* is in conflict with the Supreme Court's decision in *Buell* for failing to apply state law relating to emotional injuries to petitioner's purported FELA claim. These characterizations by petitioner are incorrect, and the Petition for Writ of Certiorari should be denied for failure to state any special and important reasons pursuant to Supreme Court Rule 17.1 — which would require this court's review.

Plaintiff's assertion that this court should grant certiorari since the circuits are divided as to the proper rule of law applicable to emotional injuries is erroneous. Petitioner relies upon the ninth circuit's decision in *Buell v. Atchison, T. & S.F., Ry.*, 771 F.2d 1320 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 1103 (1987). This court expressly refused to affirm the ninth circuit's decision on the emotional injury issue, and noted that plaintiff's claim in *Buell* involved at least one episode of a "physical tort." *Buell*, 107 S.Ct. at 1418 & n.22. The seventh circuit and the ninth circuit are in agreement that an FELA action is stated if a physical tort is alleged. *Lancaster*, 773 F.2d at 813.

Petitioner's contention that post-*Buell* cases in the ninth circuit have reaffirmed the rule that wholly emotional injuries are compensible is inaccurate. *Taylor v. Burlington N. R.R.*, 787 F.2d 1309 (9th Cir. 1986), decided after the *ninth circuit* appellate decision in *Buell*, was decided *prior* to this court's ruling in *Buell*. This court affirmed *Buell* on other grounds and specifically held that: "given the posture of this case, there was no reason for the Court of Appeals to express an opinion on [the wholly emotional injury] issue." *Buell*, 107 S.Ct. at 1418. Furthermore, the appellate court in Taylor specifically questioned the rule pronounced by

the ninth circuit in *Buell. Taylor,* 787 F.2d at 1313. The court in *Taylor* also recognized that the issue of wholly emotional injury was not squarely presented because, like *Buell,* a physical tort may have been involved. *Taylor,* 787 F.2d at 1313.

Given the fact the ninth circuit has not yet had an opportunity to fully consider *Lancaster* and the issue of the recoverability of wholly emotional injuries subsequent to the supreme court's decision in *Buell,* petitioner's assertion that a conflict between the seventh and ninth circuits exist is premature.

Plaintiff also attempts to rely on the conflict between the seventh circuit and the fifth circuit as a basis for invoking this court's review. *Compare Lancaster and Yawn v. Southern Ry.,* 591 F.2d 312 (5th Cir. 1979). However, the seventh circuit noted that plaintiff's complaint did not even comply with the requirements of *Yawn*, therefore, no conflict is presented in this case. *Hammond,* 848 F.2d at 98. Plaintiff's allegation that *Hagerty v. L & L Marine Services, Inc.,* 797 F.2d 256 (5th Cir. 1986) allows recovery for wholly emotional injuries without an accompanying "physical tort" is erroneous. The court on reconsideration specifically stated that emotional injuries were recoverable, *assuming the complaint stated an action* under the Jones Act. Given the modified opinion on rehearing, *Hagerty* cannot be construed as conflicting with the "physical tort" requirement of the seventh circuit.

Petitioner complains that the seventh circuit failed to address its claim for intentional infliction of emotional distress (Petition for Certiorari, p.13), and that, after the court found no FELA cause of action was stated, it incorrectly found a "minor dispute" existed, which was preempted under the mandatory provisions of the RLA. (Petition for Certiorari, p.11–16). Petitioner's contention that the court failed to address the Illinois common law claim is incorrect. The court set out the specific allegations of the amended complaint (which contained plaintiff's state law claim for the first time), (*Hammond,* 848 F.2d at 96), and concluded

that "[t]he amended complaint which Hammond then filed was not frivolous, but it was clearly barred by *Lancaster,* and therefore properly dismissed." *Hammond,* 848 F.2d at 98.

Petitioner also argues that the circuit court's decision in *Hammond* is in conflict with this court's decision in *Lingle v. Norge Div. of Magic Chef, Inc.,* 108 S.Ct. 1877 (1988). Plaintiff asserts that its claim was "independent" of the collective bargaining agreement. (Petition for Certiorari, p.12). First, it must be stressed that *Lingle* arose under the §301 of the Labor Management Relations Act rather than the RLA. The RLA has a greater preemptive effect. *Jackson v. Consolidated Rail Corp.,* 717 F.2d 1045 (7th Cir. 1983), *cert. denied,* 464 U.S. 1007 (1984); *Lingle,* 108 S.Ct. at 1883 & n.8. As the supreme court stated in *Andrews v. Louisville & N. R.R.,* 406 U.S. 320, 323 (1972), "the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself."

Furthermore, *Lingle* concerned a claim for retaliatory discharge under §301. The court did not cite, and therefore, did not reverse its previous decision in *Andrews,* which involved a claim for retaliatory discharge under the RLA. Prior to the decision in *Lingle,* the circuit courts were in conflict regarding whether a claim for retaliatory discharge was preempted by §301. *Lingle,* 108 S.Ct. 1877, 1879 & n.1. No question has existed in the circuits since the decision in *Andrews* concerning the preemptive effect of the RLA in connection with retaliatory discharge claims.

Finally, *Lingle* was based on the reasoning that the petitioner's claim for retaliatory discharge could be decided independent of the collective bargaining agreement. In *Choate v. Louisville & N. R.R.,* 715 F.2d 369, 371 (7th Cir. 1983), the court found that a state claim for intentional infliction of emotional distress, under Illinois law, could not be decided independently of the collective bargaining agreement due to the nature of the state law tort.

Lingle is inapplicable to the RLA and claims for intentional infliction of emotional distress, especially as that tort is interpreted under Illinois law.

Petitioner argues that the decision in *Hammond* is in conflict with the Illinois appellate court's decision in *Milton v. Illinois Bell Telephone,* 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981). Clearly, since petitioner's claim is preempted by the provisions of the RLA and the state law claim is not independent of the collective bargaining agreement, no state law claim may be maintained. Furthermore, petitioner's allegations fall short of stating a claim under Illinois law. *Milton,* 427 N.E.2d at 831; *Public Finance Corp. v. Davis,* 66 Ill. 2d 85, 360 N.E.2d 765 (1977)(requiring extremely outrageous conduct); *Robbins v. Kass,* 163 Ill. App. 3d 927, 516 N.E.2d 1023 (1987)(physical manifestations required); *Lewis v. Westinghouse Electric Corp.,* 139 Ill. App. 3d 634, 487 N.E.2d 1071, 1073 (1985)(conduct must cause distress to person of ordinary sensibilities); *Buell,* 107 S.Ct. at 1416 n. 13.

Plaintiff also asserts that the decisions of the seventh circuit in *Lancaster* and *Hammond* are in conflict with the pronouncements in *Urie v. Thompson,* 337 U.S. 163 (1949). Petitioner implies that *Urie* requires an extremely broad view of the FELA, apparently broad enough to encompass wholly emotional injuries as a result of non-physical torts. This court in *Buell,* after citing the language in *Urie,* found that the interpretation of the FELA did not compel the conclusion that wholly emotional injuries are compensible. *Buell,* 107 S.Ct. at 1417–18.

CONCLUSION

Petitioner has failed to delineate any conflict between the decision in *Hammond* and decisions of the Supreme Court or other circuit courts. No "special and important" reasons for review have been presented, and this court should deny review pursuant to Supreme Court Rule 17.1.

Respectfully submitted,

TERMINAL RAILROAD
ASSOCIATION OF ST. LOUIS

By_____

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CERTIFICATE OF SERVICE BY MAIL

I, Richard M. Roessler, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Terminal Railroad Association of St. Louis, respondent herein, hereby certifies that on October 6, 1988, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the attached Brief in Opposition on the parties herein as follows:

On Billie Hammond, petitioner herein, by depositing such copies in the United States mail with first class postage prepaid, properly addressed to the post office address of Michael Wolff, Counsel of Record for Petitioner, 4144 Lindell Blvd., Suite 138, St. Louis, Missouri, 63108.

All parties required to be served have been served.

DATED October 6, 1988.

/s/ Richard M. Roessler

Supreme Court, U.S.
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(3)

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v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Federal Employers' Liability Act provides a railroad employee with a cause of action for a purely emotional injury.

2. Whether the Railway Labor Act preempts a common law cause of action for a purely emotional injury.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-399

BILLIE HAMMOND, PETITIONER

v.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner, a railroad switchman, seeks recovery from his employer under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, and the common law for emotional injuries that he allegedly sustained in the course of his employment. The court of appeals affirmed a district court judgment holding that the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, provides the sole remedy for petitioner's alleged injury.

1. a. Congress enacted the FELA to provide a federal remedy for railroad workers employed in interstate commerce who suffer personal injuries as a result of the negligence of their employers or their fellow employees. See generally *Atchison, T. & S.F.R.R.* v. *Buell,* 480 U.S. 557, 561-562 (1987). Section 1 provides:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in [interstate] commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. 51. A plaintiff may file his FELA suit in either federal or state court. 45 U.S.C. 56. If a plaintiff elects to file in state court, the defendant cannot remove the suit to a federal forum. 28 U.S.C. 1445(a).[1]

"The coverage of the [FELA] is defined in broad language, which has been construed even more broadly." *Buell,* 480 U.S. at 561-562 (footnotes omitted). The FELA eliminates a number of traditional tort liability defenses (such as the common law's "fellow servant" rule) and expressly nullifies any attempt by a carrier, through contractual agreement or otherwise, to deprive its employees of their statutory remedy. 45 U.S.C. 55. This Court has held that causation may be established by proofs showing that "employer negligence played any part, even the slightest,

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[1] Section 1445(a) provides:

> A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

28 U.S.C. 1445(a).

in producing the injury or death for which damages are sought" (*Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)), and it has construed the FELA's remedy to reach some kinds of intentional torts (*Jamison* v. *Encarnacion*, 281 U.S. 635, 641 (1930)). See *Buell*, 480 U.S. at 562 n.8. This Court has also held that the FELA remedy generally supersedes state laws that otherwise would determine an interstate carrier's liability for an employee's workplace injury. See *Erie R.R.* v. *Winfield*, 244 U.S. 170 (1917); *New York Cent. R.R.* v. *Winfield*, 244 U.S. 147 (1917).

b. Congress enacted the RLA to provide a collective bargaining and arbitration mechanism for avoiding and resolving disputes between management and labor that may lead to interruption of interstate commerce. See 45 U.S.C. 151a. The Act imposes a duty on "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" (45 U.S.C. 152 First). The Act provides distinct procedures for resolving so-called "major" and "minor" disputes.

Major disputes involve "the formation of collective agreements or efforts to secure them." See *Elgin, J. & E.R.R.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). When a major dispute occurs, the parties must preserve "rates of pay, rules, [and] working conditions" (45 U.S.C. 156) while they engage in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. See *Detroit & T.S.L. R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969).[2]

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[2] If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second

Minor disputes, by contrast, generally involve "the meaning or proper application" of a particular collective bargaining agreement. See *Elgin*, 325 U.S. at 723. Unlike a major dispute, if a minor dispute is not settled through initial discussions, it may be "referred by petition of the parties or by either party" to one of a number of grievance "adjustment boards" for mandatory arbitration. 45 U.S.C. 153 First (i), Second.[3]

c. This Court addressed the interrelationship of the FELA and the RLA in *Atchison, T. & S.F.R.R.* v. *Buell*, *supra*. In that case, a railroad carman sued his employer under the FELA, alleging that the railroad's failure to provide him with a safe place to work had caused him severe emotional injury. See 480 U.S. at 559-560. The railroad responded that the RLA's "minor" dispute mechanism, which requires binding arbitration, provided the carman with an exclusive remedy (*id.* at 560). The Court rejected the railroad's argument, stating (*id.* at 564):

> The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages.

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and Seventh, 155 First, 156, 157, 160. See also *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444 n.10 (1987); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

[3] In such circumstances, the adjustment board's arbitration decision is binding on the parties (45 U.S.C. 153 First (m), Second), and judicial review is narrowly limited to whether the board exceeded its jurisdiction, failed to comply with the RLA's specific statutory requirements, or was influenced by fraud or corruption (45 U.S.C. 153 First (q), Second). See *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978) (per curiam).

The Court added (*id.* at 567): "Although we do not decide today whether purely emotional injuries are cognizable under the FELA, we stress that it is the FELA that controls that inquiry, not the RLA."

2. a. Petitioner filed this action against respondent on December 27, 1985, in the Illinois Circuit Court for the Third Judicial District (Madison County). His complaint,[4] which stated that petitioner's and respondent's "rights and liabilities are governed by a certain Act of Congress known as the Federal Employers Liability Act" (Add., *infra,* 2a), alleged that respondent had filed "inappropriate" and "unwarranted" disciplinary charges against petitioner "for the purpose of causing harassment and emotional stress," which resulted in petitioner's hospitalization and inability to work (*ibid.*). See Pet. App. A1, A8.

Respondent removed petitioner's action to the United States District Court for the Southern District of Illinois and moved for dismissal, contending that petitioner's allegations constituted an RLA minor dispute that was subject to mandatory arbitration. Petitioner requested the federal district court to remand the action to the state forum, and he filed an amended complaint in federal court that set forth his FELA claim with greater particularity and that added a state law claim (see Add., *infra,* 4a-10a). Shortly before this Court issued its decision in *Buell,* the federal district court denied petitioner's motion to remand and granted respondent's motion to dismiss. Pet. App. A8-A11. The court concluded, on the basis of the allegations contained in the original complaint, that the petitioner's FELA claim was "inextricably intertwined" with the RLA bargaining process, that the RLA "therefore preempt[ed]" petitioner's FELA claim, and that removal ac-

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[4] We have reproduced petitioner's complaint and his first amended complaint as addenda to this brief.

cordingly was proper (Pet. App. A10-A11). The court further concluded that petitioner's claim raised a minor dispute subject to mandatory arbitration (*id.* at A11). See *id.* at A1-A2.

b. The court of appeals affirmed the district court's dismissal. Pet. App. A1-A6. The appellate court recognized that "the anterior question is whether the suit was properly removed" (*id.* at A2). It observed that 28 U.S.C. 1445(a) prohibits removal of claims "arising under" the FELA (see note 1, *supra*) and that there is "no way around the stark imperative of section 1445(a) unless it is apparent from the pleadings that the suit arises under the [RLA] rather than the FELA, so that in effect the complaint is mislabeled" (*id.* at A3). The court concluded that petitioner's state court complaint was, in fact, mislabeled (*id.* at A4). In the court of appeals' view (*ibid.*):

> That pleading complained only about the railway's having filed allegedly unmeritorious disciplinary charges; it was a pure breach of contract claim, like a claim for having been fired without just cause; and the contract is the collective bargaining agreement.

The court of appeals accordingly held that "the district court could not be faulted for denying the motion to remand the case to state court" (*ibid.*).

The court of appeals then addressed the district court's dismissal of the action. It acknowledged that *Buell* undermined the district court's conclusion that the RLA preempts an otherwise valid FELA claim, but it concluded that petitioner's action nevertheless was subject to dismissal (Pet. App. A2-A6). In the court of appeals' words (*id.* at A2):

> A suit that states a claim under the FELA * * * cannot be thrown out on the ground that it is really a minor dispute under the RLA. It can, of course, be

> thrown out on the ground that it does not state a claim under the FELA, and in *Lancaster v. Norfolk & W. R[.R.]*, 773 F.2d 807, 813 (7th Cir. 1985), we held that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact."

The court concluded that even "[t]he *amended* complaint, filed in the district court after the denial of the motion to remand, stated no claim under the FELA as interpreted in *Lancaster*" (*id.* at A4). The amended complaint "was not frivolous, but it was clearly barred by *Lancaster* and therefore properly dismissed" (*id.* at A6).[5]

DISCUSSION

Petitioner contends that this case provides an appropriate opportunity for the Court to consider: (1) whether the FELA provides a railroad employee with a cause of action for a purely emotional injury (Pet. 6-11); and (2) whether the RLA preempts common law remedies for emotional injury (Pet. 11-16). The first question, which this Court left unresolved in *Atchison, T. & S.F. R.R.* v. *Buell, supra,* may ultimately warrant this Court's review. We nevertheless submit that this petition for a writ of certiorari should be denied. In our view, the court of appeals erred in upholding the removal of petitioner's action from

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[5] The court of appeals observed that petitioner's amended complaint "could not be thought frivolous, since the Ninth Circuit explicitly disagrees with *Lancaster* (see *Lewey* v. *Southern Pacific Transportation Co.*, 799 F.2d 1281, 1288 (9th Cir. 1986) (citing cases)), the Fifth Circuit disagrees implicitly (see *Yawn* v. *Southern Ry.*, [591 F.2d 312, 316-317 (5th Cir. 1979)]), and the Supreme Court reserved the issue in *Buell* (see 107 S.Ct. 1417-1418)." Pet. App. A4. The court of appeals considered petitioner's original complaint frivolous, however, because that complaint failed to allege that petitioner's injuries arose from unsafe working conditions. See *id.* at A5.

a state to a federal forum. That procedural misstep permitted the court to reach the merits of petitioner's claims, which it resolved summarily based on its pre-*Buell* precedent. As a result of this series of events, the record here is scant and—as was the case in *Buell* (480 U.S. at 568-571)—is not sufficiently developed to permit careful analysis of the question.

1. The court of appeals recognized that Section 1445(a) prohibits removal of actions "arising under" the FELA. See Pet. App. A3-A4. The court nevertheless found removal appropriate here on the theory that, although petitioner attempted to invoke the FELA, his original pleading "was a pure breach of contract claim" (*id.* at A4). We disagree with that characterization of petitioner's complaint.

As a general rule, "the party who brings a suit is master to decide what law he will rely upon * * *." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). The allegations contained in his complaint "determine whether he will bring a 'suit arising under' " (*ibid.*) a particular federal law. There can be no doubt in the instant case that petitioner's state court action was intended to invoke the FELA's remedial scheme. His original complaint unambiguously stated that the employer's and employee's "mutual and respective rights and liabilities are governed by a certain Act of Congress known as the Federal Employers Liability Act" (Add., *infra*, 2a).

While it undoubtedly is true that a claim "does not arise under the FELA merely because the plaintiff names that statute in his complaint" (Pet. App. A3), petitioner here did more than simply cite the FELA. Petitioner's complaint stated a cause of action that—while tersely described—bore the characteristics of an FELA claim rather than a contractual dispute. Petitioner alleged that respondent intentionally took certain disciplinary actions

against him "for the purpose of causing harassment and emotional stress" (Add., *infra,* 2a), that respondent's actions "caused" petitioner "deep depression and agitation" (*ibid.*), and that, as a result, petitioner "has been hospitalized and has been unable to perform his job duties" (*ibid.*). Petitioner's claim thus states, albeit in rather rudimentary form, an FELA analog for the common law claim of intentional infliction of emotional distress. See *Buell,* 480 U.S. at 568 (noting that FELA jurisprudence gleans guidance from common law developments); compare Restatement (Second) of Torts § 46 (1965) (describing the tort of intentional infliction of emotional distress).[6]

Petitioner's original complaint could have been stated with greater detail and precision. But the complaint was adequate to give respondent "fair notice of what the plaintiff's claim is and the grounds upon which it rests" (*Conley* v. *Gibson,* 355 U.S. 41, 47 (1957)), and it appeared to satisfy the requirements of Illinois law.[7] It may well be

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[6] The court of appeals' conclusion that petitioner's complaint stated "a pure breach of contract claim" (Pet. App. A4) is somewhat startling. First, the complaint *nowhere* alleges that the employer is subject to contractual duties or that the employer breached those duties. See Add., *infra,* 1a-3a. Second, the RLA's "minor dispute" provisions, which require mandatory arbitration of contract disputes, would *prohibit* petitioner from bringing a breach of contract action. See pages 3-4 & n.3, *supra.* Thus, the court of appeals construed a complaint that made no mention of a contract or its breach as stating an impermissible breach of contract claim.

[7] Under Illinois law, "[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." Ill. Ann. Stat. ch. 110, para. 2-612(b) (Smith-Hurd 1983). Illinois law further provides that if "any pleading is insufficient in substance or form the court may order a fuller or more particular statement." Ill. Ann. Stat. ch. 110, para. 2-612(a) (Smith-Hurd 1983).

that the FELA ultimately would not provide a remedy in the circumstances alleged. But that issue goes to the merits of petitioner's FELA claim, and not to the question of removal. Section 1445(a)'s bar on removal of FELA actions cannot be overcome by a removal petition challenging the merits of the suit. See *Great Northern R.R.* v. *Alexander,* 246 U.S. 276, 281-282 (1918); *Southern R.R.* v. *Lloyd,* 239 U.S. 496, 500 (1916); cf. *The Fair,* 228 U.S. at 25 ("if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad").[8]

We accordingly submit that the lower courts erred in permitting removal of petitioner's FELA action. Since petitioner has not sought correction of that error in this Court, he has presumably waived any objection to removal—a waiver we believe he may properly make. See *Lirette* v. *N.L. Sperry Sun, Inc.,* 820 F.2d 116, 117 (5th Cir. 1987) (en banc).[9] But that error, which resulted in an

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[8] The court of appeals' suggestion that petitioner's original complaint was frivolous (Pet. App. A5) is unconvincing. This Court left open in *Buell* the question whether, and under what circumstances, the FELA would provide a remedy for "wholly mental injury" (480 U.S. at 567). As the Court noted, the question may well turn on analogies to developing state common law, which manifests widely divergent approaches with respect to "the degree of intent required to establish liability, and the level of physical manifestation of the emotional injury required to support recovery" (*id.* at 568-569, footnotes omitted). Under these circumstances, petitioner's complaint should not be deemed frivolous on the mere ground that it failed to allege "unsafe working conditions" (Pet. App. A5).

[9] The Section 1445(a) limitation was first enacted as part of the FELA (Act of Apr. 5, 1910, ch. 143, 36 Stat. 291) and was subsequently codified in Title 28. The Fifth Circuit originally held that Section 1445(a) was a non-waivable jurisdictional provision, see *Gamble* v. *Central of Ga. R.R.,* 486 F.2d 781, 785 (1973), but later overruled that decision in *Lirette.* In holding that a plaintiff could waive Section

unnecessary discussion of the merits, nevertheless affects the present posture of this case. Here, as in *Buell,* the court of appeals engaged in a resolution of the merits of the claim on a record that "has never been developed on the exact nature of the allegedly tortious activity, or the extent of the injuries that [petitioner] claims to have suffered" (*Buell,* 480 U.S. at 567).

2. As this Court explained in *Buell,* "whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case" (480 U.S. at 568). Instead, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity" (*ibid.*). Thus, "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand" (*id.* at 570).

Here, as much as in *Buell,* this Court cannot "know what all those facts are in this case" (480 U.S. at 570). The lower courts decided petitioner's suit based solely on petitioner's original and amended complaint. Thus, the Court "cannot begin to decide whether [petitioner] will be able to support his allegation that [respondent is] liable to him under the FELA" (*ibid.*). The lack of an adequate record—here, as in *Buell*—would pose a substantial, if not insurmountable, obstacle if this Court were to attempt to resolve the question whether the FELA permits recovery for emotional injury.[10]

1445(a)'s prohibition on removal (820 F.2d at 117), the court of appeals relied on *Grubbs* v. *General Elec. Credit Corp.*, 405 U.S. 699 (1972).

[10] We agree with respondent that the decision below does not squarely conflict with the holding of any other court of appeals. The

3. Neither the court of appeals nor the district court explicitly addressed petitioner's second question—whether the RLA preempts a common law suit for emotional injury. It is not clear whether petitioner, who relies alternately on "federal common law" (Pet. i (Questions Presented)) and "Illinois common law" (*id.* at 11), adequately presented that question below. We would expect, in any event, that the relevant inquiry would also include the question whether the *FELA*—which is concerned with personal injury—preempts petitioner's common law tort claim. See *New York Cent. R.R.* v. *Winfield,* 244 U.S. 147 (1917). Obviously, the FELA's preemptive effect may turn on the scope of the FELA remedy. Assuming that petitioner's second question is a matter in issue and was properly preserved below, the record here, as in the case of the first question presented, is inadequate to allow this Court a meaningful opportunity to address that question in all its aspects.

We accordingly conclude that the case does not provide an appropriate opportunity to resolve the issue that this Court left open in *Buell,* nor does it present any other issue warranting this Court's review.

Ninth Circuit's decision in *Buell,* 771 F.2d 1320, 1321, 1324 (1985), was vacated by this Court (480 U.S. at 571) and other decisions cited by petitioner appear distinguishable on their facts. The reasoning of the court below, however, is at odds with the reasoning of the Ninth Circuit in *Buell* and other cases, and its holding may be in conflict with that of the California Supreme Court in *McMillan* v. *Western Pac. R.R.,* 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d 449 (1960). But all these decisions were pre-*Buell,* and this Court's approach in *Buell* strongly suggests the desirability of awaiting a case with a fully developed record.

CONCLUSION

The petition for a writ of certiorari should be denied.[11]
Respectfully submitted.

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JANUARY 1989

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[11] The court of appeals may well have erred in resolving this case on the basis of its pre-*Buell* decision in *Lancaster* v. *Norfolk & W.R.R.*, 773 F.2d 807 (7th Cir. 1985) (see page 7, *supra*), rather than following this Court's example in *Buell* and remanding the case for further factual development. Though this Court may wish to consider summary reversal on that ground, we do not believe such a case-specific error is an appropriate basis for plenary review.

ADDENDUM A

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

No. 87-L-1775

BILLIE HAMMOND, PLAINTIFF

VS.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, DEFENDANT

[Filed Dec. 27, 1985]

COMPLAINT

Comes now the plaintiff, BILLIE HAMMOND, by and through his undersigned attorneys, KASSLY, BONE, BECKER, DIX & TILLERY, P.C., and for his Complaint against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, states as follows:

1. That the defendant, Terminal Railroad Association of St. Louis, is now and was at all times herein mentioned, a corporation duly authorized and existing according to the laws of the State of Illinois, and was engaged in the business of a common carrier by railroad in interstate commerce in Madison County, Illinois.

2. That the plaintiff, BILLIE HAMMOND, at all times mentioned herein was an employee of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, and was at all times mentioned herein working as a switchman for the

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS in connection with railroad cars moved by it in interstate commerce.

3. That the plaintiff, BILLIE HAMMOND, and the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, were at said time in place and employed and engaged in interstate commerce, and by reason thereof, their mutual and respective rights and liabilities are governed by a certain Act of Congress known as the Federal Employers Liability Act, 45 U.S.C. § 51 et al.

4. That on or about August 12, 1985, the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, through its employees and agents, formally charged the plaintiff with a violation of his job duties.

5. That on or about August 21, 1985, the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, formally charged the plaintiff with unnecessary delays in his job performance.

6. That both of the above stated formal charges processed by the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, against the plaintiff were done so inappropriately and for the purpose of causing harassment and emotional stress directed toward the plaintiff.

7. That the plaintiff has experienced deep depression and agitation that was caused in whole or in part from stress of his employment and the above stated inappropriate and unwarranted formal charges by the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.

8. That as a result of his depression and emotional disorders, the plaintiff has been hospitalized and has been unable to perform his job duties with the defendant. The plaintiff has incurred medical expenses and lost income as a result of his illness, and the plaintiff will incur medical expenses and lost income in the future. The plaintiff has also experienced great emotional mental anguish as a result of his illness.

WHEREFORE, the plaintiff, BILLIE HAMMOND, prays judgment against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, in an amount reasonable and equitable and in excess of the amount necessary to confer jurisdiction upon the Circuit Judge Division of this court, plus costs of suit.

PLAINTIFF DEMANDS TRIAL BY JURY

KASSLY, BONE, BECKER,
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By /s/ Stephen M. Tillery
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ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 86-5038

BILLIE HAMMOND, PLAINTIFF

VS.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION, DEFENDANT

[Filed Nov. 19, 1986]

FIRST AMENDED COMPLAINT

COMES NOW the plaintiff, BILLIE HAMMOND, by and through his attorney, *STEPHEN M. TILLERY, and leave of Court having first been obtained to amend his Complaint* against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *a corporation*, states as follows:

COUNT I

For Count I of his First Amended Complaint against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, the plaintiff states as follows:

1. That the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, is now and was at all times herein mentioned, a corporation duly authorized and existing according to the laws of the State of Illinois, and was engaged in the business of a common carrier by railroad in interstate commerce in Madison County, Il-

linois, *with its principal place of business in the State of Illinois.*

2. That the plaintiff, BILLIE HAMMOND, at all times mentioned herein, was an employee of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, and was at all times mentioned herein working as a switchman for the TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS in connection with railroad cars moved by it in interstate commerce.

3. *That the jurisdiction of this Court is based upon an Act of Congress of the United States known as the Federal Employer's Liability Act, 45 U.S.C. Section 51, et. seq.*

4. *That during August of 1985, supervisors of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, intentionally harassed the plaintiff through use of the following practices:*

(a) *Repeatedly and severely criticized plaintiff for allegedly spotting cars in the wrong location on industry tracks while plaintiff was under charges for such alleged improper spotting, and while he was under written notice that he was to attend a formal investigation into this matter where he could reasonably foresee an assessment of discipline;*

(b) *Setting wildly unrealistic time estimates for tasks assigned to plaintiff and wearing him out physically and mentally thereby;*

(c) *Keeping an extraordinarily close watch on plaintiff's work and following him from work assignment to work assignment;*

(d) *Inducing plaintiff to sign a waiver of his right to a formal investigation into the alleged improper spotting of cars on industry tracks, and accepting a discipline of reprimand under the threat that if he did not sign for such a repri-*

mand waiving his right to formal investigation, that he would be subject to loss of his rights to work as a switching foreman, and suffer actual suspension; and further, promising plaintiff that the entire discipline matter would be resolved and ended by his signing said waiver. That the defendant made this promise to plaintiff that it would end the discipline proceedings against him with the full knowledge that at the time the plaintiff signed said waiver, it was in the process of issuing an additional series of written charges against plaintiff, continuing the discipline proceedings against him;

(e) *Issuing, in fact, the additional series of written charges against plaintiff continuing the discipline proceedings against him;*

(f) *Arbitrarily denying plaintiff the right to "mark off" from work on Sunday, August 26, 1985, thereby requiring plaintiff to remain working irregular hours as a switchman assigned to the switchman's extra board seven (7) days a week without prospect of time off from work to obtain relief from the supervisory harassment;*

(g) *Holding a discipline hearing on the additional series of written charges against plaintiff, and continuing the discipline proceedings against plaintiff during plaintiff's absence due to his medical and psychiatric treatment and care.*

5. *That the conduct of the defendant's supervisors hereinabove, exceeded the bounds of socially tolerable employer practices.*

6. *That the defendant,* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, *by and through its officers and ex-*

ecutives, negligently and carelessly committed one or more of the following acts or omissions of negligence:

(a) *Failed to provide the plaintiff with a reasonably safe place to work free of intentional supervisory harassment;*

(b) *Failed to hire competent supervisory personnel;*

(c) *Failed to properly train and instruct supervisory personnel in the performance of their duties;*

(d) *Failed to adequately monitor the supervisory personnel in the performance of their duties.*

7. *That as a result of the defendant's conduct, the plaintiff has suffered severe and permanent emotional disorder, depression, mental distress, anguish, and nervous tension, requiring hospitalization and medical care. The plaintiff has been unable to perform his job duties with the defendant, and will continue to be unable to perform his job duties. Plaintiff has incurred medical expenses and lost income as a result of his psychiatric injury, and he will incur medical expenses and lost income in the future.*

WHEREFORE, the plaintiff, BILLIE HAMMOND, prays judgment against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, in amount reasonable and equitable, and in excess *of that amount necessary to confer jurisdiction upon this Court.*

PLAINTIFF DEMANDS TRIAL BY JURY ON COUNT I

COUNT II

For Count II of his First Amended Complaint against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, the plaintiff states as follows:

1. *That the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, is now and was at all times herein mentioned, a corporation duly authorized and existing according to the laws of the State of Illinois, and was engaged in the business of a common carrier by railroad in interstate commerce in Madison County, Illinois, with its principal place of business in the State of Illinois.*

2. *That the plaintiff, BILLIE HAMMOND, at all times mentioned herein, was an employee of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, and had been an employee of the defendant, for approximately thirty (30) years.*

3. *That during August of 1985, supervisors of the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, intentionally harassed the plaintiff through use of the following practices:*

(a) *Repeatedly and severely criticized plaintiff for allegedly spotting cars in the wrong location on industry tracks while plaintiff was under charges for such alleged improper spotting, and while he was under written notice that he was to attend a formal investigation into this matter where he could reasonably foresee an assessment of discipline;*

(b) *Setting wildly unrealistic time estimates for tasks assigned to plaintiff and wearing him out physically and mentally thereby;*

(c) *Keeping an extraordinary close watch on plaintiff's work and following him from work assignment to work assignment;*

(d) *Inducing plaintiff to sign a waiver of his right to a formal investigation into the alleged improper spotting of cars on industry tracks, and accepting a discipline of reprimand under the*

threat that if he did not sign for such a reprimand waiving his right to formal investigation, that he would be subject to loss of his rights to work as a switching foreman, and suffer actual suspension; and further, promising plaintiff that the entire discipline matter would be resolved and ended by his signing said waiver. That the defendant made this promise to plaintiff that it would end the discipline proceedings against him with the full knowledge that at the time the plaintiff signed said waiver, it was in the process of issuing an additional series of written charges against plaintiff, continuing the discipline proceedings against him;

(e) *Issuing, in fact, the additional series of written charges against plaintiff continuing the discipline proceedings against him;*

(f) *Arbitrarily denying plaintiff the right to "mark off" from work on Sunday, August 26, 1985, thereby requiring plaintiff to remain working irregular hours as a switchman assigned to the switchman's extra board seven (7) days a week without prospect of time off from work to obtain relief from the supervisory harassment;*

(g) *Holding a discipline hearing on the additional series of written charges against plaintiff, and continuing the discipline proceedings against plaintiff during plaintiff's absence due to his medical and psychiatric treatment and care.*

4. *That the conduct of defendant's supervisors hereinabove described was outrageous, and was intentionally, willfully and maliciously done for the sole purpose of inflicting severe emotional distress on the plaintiff.*

5. That defendant's supervisors were acting while in the course of their employment, and that such acts were permitted, allowed, ratified and encouraged by defendant's officers and executives.

6. That as a result of the defendant's conduct, the plaintiff has suffered severe and permanent emotional disorder, depression, mental distress, anguish, and nervous tension, requiring hospitalization and medical care. The plaintiff has been unable to perform his job duties with the defendant, and will continue to be unable to perform his job duties. Plaintiff has incurred medical expenses and lost income as a result of his psychiatric injury, and he will incur medical expenses and lost income in the future.

WHEREFORE, the plaintiff, BILLIE HAMMOND, prays judgment against the defendant, TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, in amount reasonable and equitable, and in excess of that amount necessary to confer jurisdiction upon this Court.

PLAINTIFF DEMANDS TRIAL BY JURY ON COUNT II

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No. 88-399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BILLIE HAMMOND,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondent.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion under Supreme Court Rule 17.1 and issue Writ of Certiorari.

Terminal Railroad Association of St. Louis is a corporation, without any subsidiaries or affiliates. The Terminal Railroad Association of St. Louis' stockholders are the Burlington Northern Railroad Company, the Missouri Pacific Railroad Company, the St. Louis Southwestern Railroad Company, the Illinois Central Railroad Company, the CSX Transportation Company, the Norfolk & Western Railway Company, the Southern Railway Company, and the Missouri, Kansas and Texas Railway Company.

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SUPPLEMENTAL BRIEF

ARGUMENT

Upon this court's invitation, the United States, by the Solicitor General, filed an amicus brief in this action. The brief discussed new matters not raised by the Petitioner in his brief and, therefore, not addressed by Respondent in its Brief in Opposition. This Supplemental Brief is filed pursuant to Supreme Court Rule 22.6.

The United States agrees with Respondent that the Petition for Writ of Certiorari should be denied. (Brief of Amicus

Curiae, p. 13). The decision of the court of appeals is not in conflict with the decisions of any other circuit court or the decisions of this Court.

Amicus further argues that the court of appeals erred in finding that the acts alleged in the complaint were not cognizable under the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, and in not remanding the case to the district court for further factual development concerning the nature of the Respondent's conduct and Petitioner's injury. Respondent disagrees.

The appellate court correctly applied the artful pleading doctrine and looked beyond the simple invocation of the FELA statute in the complaint and at the actual allegations of wrongful conduct. *See Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 249 (7th Cir. 1981), *cert. denied*, 455 U.S. 933 (1982). Under *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987), the conduct alleged is not actionable under the FELA. The court correctly found that the conduct alleged constituted a minor dispute under the Railway Labor Act, 45 U.S.C. §151 *et seq.*, and dismissed the complaint. Resolution of the "purely emotional issue" reserved in *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410 (1987), was not necessary to the court's conclusion.

In *Buell*, this Court remanded in connection with the "purely emotional injury" issue because the underlying plaintiff never briefed or argued the issue in the lower courts. *Buell*, 107 S.Ct. at 1417. In the instant case, Petitioner has conceded since his initial brief that only emotional injuries are involved and has fully briefed the recoverability of these damages under the FELA. This Court noted in *Buell* that the issues surrounding the "purely emotional injury" issue could be decided on appropriate motion, as in this case. *Buell*, 107 S.Ct. at 1418 n.22.

The possibility of summary reversal, as suggested in a footnote to the amicus brief, should not be considered by this Court.

Reversal is inappropriate since the lower courts did not err. Summary disposition is inappropriate since it would deprive the parties and this Court of full briefing on all issues beyond the limited issue of the necessity for this Court's review under Supreme Court Rule 17.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

TERMINAL RAILROAD
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